Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1438

ILLINOIS OFFICE OF EDUCATION,

Petitioner,

vs.

DANIEL L. JENNINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ILLINOIS OFFICE OF EDUCATION,

Petitioner,

VS.

DANIEL L. JENNINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Illinois Office of Education, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on January 4, 1979.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Illinois, Southern Division, has not been reported, but is included herein as Appendix A. The Opinion of the United States Court of Appeals for the Seventh Circuit is not reported, but is included herein as Appendix B.

JURISDICTION

On January 4, 1979, the United States Court of Appeals for the Seventh Circuit entered its judgment. This Petition for a Writ of Certiorari is filed within 90 days of the date of the entry of that order. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does Congress have authority to abrogate the Eleventh Amendment to the United States Constitution by expressly creating a private cause of action for damages enforceable in the federal courts against a nonconsenting state?

CONSTITUTIONAL PROVISION INVOLVED

Eleventh Amendment to the United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or subjects of any foreign State.

STATEMENT OF THE CASE

Since 1971, the State of Illinois has allowed veterans to bring actions in the Circuit Courts of Illinois to seek reinstatement and back pay if they were wrongfully refused reemployment by an agency of the State of Illinois after returning from service (Ill. Rev. Stat., 1971, ch. 126½, par. 32). In 1974, Congress amended the Veterans' Reemployment Rights Act (hereinafter V.R.R.), 38 U.S.C. § 2021 *et seq.*, making it applicable to states and local governments, as employers, and specifically authorizing the federal district courts to enforce the V.R.R. by ordering reinstatement and awarding back pay. The present controversy was instituted in March of 1977 when plaintiff filed an action pursuant to the *V.R.R.* for wages lost as a result of defendant's refusal to rehire him.

The defendant filed a motion to dismiss on the ground that the V.R.R. was unconstitutional under the Eleventh Amendment. The District Court denied the Motion to Dismiss and graned partial summary judgment to plaintiff on the issue of liability. The court held that the Eleventh Amendment did not bar recovery of lost wages and plaintiff was entitled to back pay for the six months during which defendant refused to reinstate him. Two months later, the District Court entered final judgment for plaintiff in the sum of $3,072.08 plus interest. Defendant appealed.

On appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the Eleventh Amendment did not bar the exercise of federal jurisdiction where the federal cause of action was expressly created by Congress, acting under one of the powers enumerated in Article I of the United States Constitution (war powers).

REASONS FOR GRANTING THE WRIT

THE ELEVENTH AMENDMENT BARS A SUIT FOR A RETROACTIVE MONETARY AWARD FROM A NON-CONSENTING STATE, EVEN WHERE THE CAUSE OF ACTION WAS EXPRESSLY AUTHORIZED BY CONGRESS.

Although this Court has not directly addressed the question presented by the instant case, the holding of the Seventh Circuit Court of Appeals is contrary to well-established principles relating to the constitutional immunity of a non-consenting state from actions for retroactive monetary awards by the federal courts.

In an unprecedented decision, the Seventh Circuit Court of Appeals has held that Congress has plenary authority abrogate the Eleventh Amendment and to enact a statute creating a private cause of action for damages against the states which is enforceable in the federal courts. This decision results in a drastic shift in the allocation of power between the federal and state governments and fails to accord due deference to the policy consideration underlying the adoption of the Eleventh Amendment—the preservation of federalism.

In determining whether the Eleventh Amendment restricts congressional power to create private damage actions enforceable against states, it is instructive to view this amendment in its historical perspective. The historical basis and legal character of the Eleventh Amendment have been frequently discussed by courts and commentators. Numerous explanations for the rationale underlying this amendment have been offered. One basis which has been frequently cited as primary to the development of the gov-

ernmental immunity doctrine has been the protection of the states' fiscal integrity. *Maryland* v. *Wirtz*, 392 U.S. 183, 20 L. Ed. 2d 1020 (1968) (dissenting opinion). The "fiscal integrity" argument is, of course, debatable. See: e.g., Comment, *Monetary Remedies Against the State in Federal Question Cases*, 68 Nw. U. L. Rev. 544, 564 (1973); Baker, *Federalism and the Eleventh Amendment*, 48 U. Colo. L. Rev. 139, 145-47 (1977). Particularly where an analogous state remedy is available[1], the state's constitutional immunity under the Eleventh Amendment is not concerned with the prohibition of monetary claims *per se*, but rather such immunity is predicated upon the impropriety of judicial compulsion of state conduct and the recognition that a soverign state retains the prerogative to choose the judicial forum in which it will be amenable to suit.

In its decision in this case, the Seventh Circuit concluded that the Eleventh Amendment is merely a constitutional recognition of the common law doctrine of sovereign immunity, which Congress has the power to abrogate. Yet, there are conceptual difficulties with this determination. For example, it is well-settled that a state may waive its sovereign immunity by consenting to suits in state courts and yet still assert its Eleventh Amendment immunity. *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 88 Ill. Ed. 1121 (1944). If the Eleventh Amendment were no more than a constitutional recognition of the doctrine of sovereign immunity, it would follow that a waiver of sovereign immunity should also suffice to waive Eleventh Amendment immunity, yet this is not the case.

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1. An analogous state remedy is available in the instant case. See: Service Men's Employment Tenure Act, Ill. Rev. Stat., 1977, ch. 126½, § 29 *et seq.*

It is submitted that a more comprehensive and precise view of the development of state immunity from suits by private individuals in the federal courts also takes into account the considerations of federalism which necessarily impelled the adoption of this amendment. As one commentator has noted,

> The early development of the eleventh amendment immunity doctrine shows that although the states' concern over their indebtedness was a major factor, *the problem was much broader, and a particularly strong postulate was that of federalism and limited national powers.* (emphasis supplied). Nagata, *Federal Powers and the Eleventh Amendment: Attorney's Fees in Private Suits Against the State,* 63 Calif. L. Rev. 1167, 1179 (1975)

See also: *Edelman* v. *Jordan,* 415 U.S. 651, 660, 39 L. Ed. 2d 662 (1974) (*citing:* 1 C. Warren, The Supreme Court in United States History 91 (Rev. ed. 1937)).

Focusing on federalism leads to the conclusion that the Eleventh Amendment should be viewed as a restriction on both the judicial power to entertain, and the congressional authority to create private damage actions in the federal courts. See: Comment, *Implied Waiver of a State's Eleventh Amendment Immunity,* 1974 Duke L. J. 925.

Recent decisions by this Court have not directly discussed the extent of congressional power to create private damage actions against unconsenting states, but an examination of these decisions does demonstrate that this Court has expressed uneasiness wih plenary congressional authority to repeal the Eleventh Amendment. The first case in which this Court addressed the question of whether Congress had the authority to create private causes of action for damages against state governments was *Parden* v. *Terminal R.R. Co.,* 377 U.S. 184, 12 L. Ed. 2d 233 (1964). In *Parden* this Court

held that, despite the Eleventh Amendment, a state-owned railroad could be sued in the federal court under the Federal Employer's Liability Act (45 U.S.C. §§ 51-60 (1970)). The "implied waiver" found in *Parden* was predicated upon the fact that the state had constructively consented to suit by voluntarily operating a railroad which, for some twenty years, had been subject to federal regulation under the FELA (377 U.S. at 192-96).

In contrast, in *Employees of the Dep't. of Public Health & Welfare* v. *Missouri Dep't. of Public Health & Welfare,* 411 U.S. 279, 36 L. Ed. 2d 251 (1973), this Court refused to find an implied cause of action for damages against state employers under the Fair Labor Standards Act, despite the fact that the language of the FLSA (29 U.S.C. § 201 *et seq.* (1970)) was just as specific as the language of the FELA found sufficient in *Parden.* The decision in *Parden* was distinguished as dealing with congressional regulation of a "proprietary" activity. (411 U.S. at 284). While this Court did not specifically consider the scope of congressional power to expressly create federal causes of action against state governments, some portions of the *Employees* opinion suggest that the majority may have intended to restrict such a power.[2] For example, this Court reaffirmed the principle that the Eleventh Amendment is a barrier to federal court judgments against a "nonconsenting state" (411 U.S. at 280),

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2. It should be noted that after the decision in *Employees* Congress amended § 16(b) of the FLSA to allow private damage suits against states. 29 U.S.C. § 216(b), *as amended* by Pub. L. No. 93-259 (Apr. 8, 1974). This section was subsequently declared unconstitutional on Tenth Amendment grounds in *National League of Cities* v. *Usery,* 426 U.S. 833, 49 L. Ed. 2d 245 (1976).

and indicated that the states had not generally waived their immunity when they ratified the federal commerce power. (411 U.S. p. 280, n. 1).

In *Edelman* v. *Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662 (1974), the plaintiffs sought to recover welfare benefits which the state had wrongfully denied them under federal regulations. Federal laws governing the welfare program did not expressly create a cause of action against the states for payments withheld illegally, and this Court, relying on *Employees*, refused to find an implied cause of action for violation of the regulations. The opinion in *Edelman* also suggests, in dicta, that *Parden* and *Employees* had established a two-tiered test for congressional waiver cases—a showing first of congressional intent to abrogate the immunity and, second, of state consent to that abrogation. (415 U.S. at 663).

In its opinion, the Seventh Circuit Court of Appeals has interpreted *Parden* and its progeny as establishing that,

> * * * to make states amenable to federal damage actions there must be congressional action under a delegated power and either consent to suit by a state (express or implied) *or a clearly expressed congressional intention to abrogate the states' immunity.* (emphasis supplied). Slip opinion, p. B15.

While it is true that *Parden* contains language which is broad enough to support this interpretation, later cases have taken a more restrictive view of congressional authority to impose a waiver on the states. For example, it would be unnecessary for the court to ever consider whether a state had voluntarily consented to be sued in the federal court if Congress had the authority to abrogate the states' immunity. However, later decisions by this Court dealing with Eleventh Amendment immunity have considered the question of state waiver (*Edelman, Employees*). There is, thus, no support in these decisions for the conclusion reached by the Seventh Circuit, that Congress has "the power to make the states amenable to damage actions in the federal courts." (*Ibid*).

The only case in which this Court has directly addressed the question of whether Congress has the authority to expressely authorize the federal courts to entertain a private cause of action for damages against the states is *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614 (1976), which involved a suit under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). This Court did not find that congressional authorization was sufficient to impose a "waiver" of Eleventh Amendment immunity; indeed, the opinion in Fitzpatrick described congressional authorization as a "threshold fact" and a "prerequisite" to waiver (49 L. Ed. 2d at 619)—indicating that such authorization would not be sufficient to effect such a waiver absent state consent. The holding in *Fitzpatrick* was simply that the immunity granted by the Eleventh Amendment was "necessarily limited" by the enforcement provisions of § 5 of the Fourteenth Amendment (49 L. Ed. 2d at 621). Because the Fourteenth Amendment was adopted with the avowed purpose of limiting state autonomy, principles of federalism do not limit congressional authority to invade state autonomy as severely when it legislates under § 5 as when its enactment is based upon some other power.[3]

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3. This rationale, that the states constructively consented to such suits by ratification of a subsequent amendment which, by its terms, expressly created rights in individuals against the states, could also be applied to authorize suits arising under other subsequent amendments, *i.e.* the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth.

The decision in *Fitzpatrick* is, thus, a necessary compromise between two competing constitutional provisions. Far from indicating that express congressional authorization would be sufficient to effect a "forced waiver," this Court carefully limited the effect of its decision to suits arising under § 5 of the Fourteenth Amendment,

> * * * We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials *which are constitutionally impermissible in other contexts* (citations omitted and emphasis supplied). 49 L. Ed. 2d at 622.

Finally, this Court's decision in *Hutto* v. *Finney*, ——U.S. ——, 46 L.W. 4187 (1978) does not support the decision of the Seventh Circuit in this case. *Hutto* involved the question of whether attorney's fees could be awarded against a nonconsenting state under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). This Court held that the Eleventh Amendment did not bar such an award because first, Congress acted under its enforcement powers under § 5 of the Fourteenth Amendment (*Fitzpatrick* v. *Bitzer, supra*) and, second, the Act imposed attorney's fees as an element of costs which have "traditionally been awarded without regard for the States' Eleventh Amendment immunity." (46 L.W. at 4821). The decision in *Hutto* does not indicate that Congress can force a state to waive the immunity conferred by the Eleventh Amendment.

It is axiomatic that the federal government must have the power to ensure that the national laws are enforced. However, the prohibition contained in the Eleventh Amendment, even if it is construed as a limitation on congressional authority, will not operate to deprive Congress of

this essential function. First, it must be recognized that the doctrine of sovereign immunity, which developed in the context of suits against a sovereign by its subjects, does not immunize a state against suits by the federal government. It has long been realized that our constitutional scheme of government requires that Congress have the power to ensure enforcement of the federal laws in areas within congressional control. See: e.g., *United States* v. *California,* 297 U.S. 175, 183-85, 80 L. Ed. 567 (1936); *United States* v. *Texas,* 143 U.S. 621, 36 L. Ed. 285 (1892).

Furthermore, the tension between local autonomy and federal authority which is created when one government is forced to answer for its wrongs in the courts of another is particularly inappropriate in this case because the State of Illinois has expressly waived sovereign immunity with respect to veteran's reemployment cases, allowing these actions to be filed in the circuit courts. (Ill. Rev. Stat., 1977, ch. 126½, par. 32). Thus, the preservation of Illinois' Eleventh Amendment immunity in this case would constitute no more than "a regulation of the forum in which . . . [the plaintiff] may seek a remedy." (*Employees,* 36 L. Ed. 2d at 264, Marshall, J.)

Although it is conceded that certain cases are more appropriately heard in the federal courts because they present complex questions of federal law (e.g. patent, copyright, etc.), the instant case does not present such a question. Therefore, there is no reason to assume that Congress provided a private remedy in the federal courts to afford such litigants access to the expertise possessed by the federal bench and bar.

Another factor which must be considered in determining whether federal assumption of jurisdiction may be justified is whether there is a substantial likelihood that the

state courts would be prejudiced against the claims presented by individual litigants in this type of case. It is doubtful, however, that Congress felt that the states would be hostile to the claims of veterans in reemployment cases. Although Congress has the unquestioned authority to preempt this field, it chose to allow the states to have concurrent jurisdiction. Section 2021(c) of the V.R.R. provides that,

> The rights guaranteed by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections. 38 U.S.C. § 2021(c)

Since the state courts would be competent to adjudicate these claims and there has been no indication that Congress feels that the states would be prejudiced against the litigants, there are no factors militating strongly in favor of exclusive federal jurisdiction in veterans' reemployment cases. Therefore, the congressional authorization of a private damage action against the State of Illinois in this case constituted an unwarranted intrusion into the local affairs of this State.

Finally, the Court of Appeals relies on the decision of *Case* v. *Bowles*, 327 U.S. 92, 90 L. Ed. 552 (1946) as support for its holding in the instant case. It reasoned that since a valid exercise of the war powers has been sufficient to sustain the validity of an enactment that might otherwise have violated the Tenth Amendment, it follows that the war powers would likewise prevail over the state's Eleventh Amendment defense. (Slip opinion, p. B5) However, it is submitted that such a conclusion is unwarranted. The Tenth Amendment restricts the power of Congress to enact legislation which constitutes an unwarranted interference with a state's local affairs, while the Eleventh Amendment merely restricts the forum which may be provided to redress grievances. Thus, the fact that certain legislation is deemed necessary to the national security or defense does not necessarily mean that Congress has also correctly determined that it is justified in creating a damage action enforceable in the federal courts. Absent a showing that the national interests demand an adjudication of rights in a federal court, such action would offend the prohibition contained in the Eleventh Amendment, particularly where the legislation regulates a governmental function.

It has long been acknowledged that "[b]ehind the words of the constitutional provisions are postulates which limit and control." *Monaco* v. *Mississippi*, 292 U.S. 313, 322, 78 L. Ed. 1282 (1934). The decision of the Seventh Circuit in this case offends the Eleventh Amendment, not because it directly contravenes the literal prohibition contained therein,[4] but because it promotes unnecessary federal intrusion into state affairs, and disrupts the delicate balance between the powers of the federal and state governments which the Eleventh Amendment was adopted to maintain. The erosion of state autonomy which is fostered by this decision offends the controlling principle implicit in the adoption of the Eleventh Amendment—a limitation on the powers of the federal

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4. This Court has never been bound by a literal reading of the Eleventh Amendment. See: e.g., *Hans* v. *Louisiana*, 134 U.S. 1, 33 L. Ed. 842 (1890); *Ex Parte New York*, 256 U.S. 490, 497-98, 65 L. Ed. 1057 (1921).

government. Consequently, the conclusion of the Seventh Circuit Court of Appeals, that Congress can impose a "forced waiver" of Eleventh Amendment immunity whenever it expressly authorizes private damage actions, must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS—
SOUTHERN DIVISION

DANIEL L. JENNINGS,
Plaintiff,
v.
ILLINOIS OFFICE OF EDUCATION,
Defendant.
77-3051

MEMORANDUM ORDER

The cause is before me on Plaintiff's Motion for Partial Summary Judgment (on the issue of liability) and Defendant's Cross Motion for Summary Judgment. The Court has considered the motions and the memoranda filed by Plaintiff. (It is noted that no memorandum in support of Defendant's Motion is in the Court file contrary to local rule.) Based upon the motions and memoranda, it is my opinion that Plaintiff is entitled to partial summary judgment on the issue of liability, and that Defendant's Cross Motion for Summary Judgment is without merit. Attorney for Plaintiff is directed to prepare an appropriate order. Cause set for trial on the issue of damages on Wednesday, February 15, 1978, at 9:30 a.m., at Springfield, Illinois.

Enter this 18th day of January, 1978.

J. WALDO ACKERMAN,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS—
SOUTHERN DIVISION

DANIEL L. JENNINGS,
Plaintiff,
v.
ILLINOIS OFFICE OF EDUCATION,
Defendant.

Civil Action
77-3051

MEMORANDUM ORDER INCORPORATING FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In accordance with the Court's Memorandum Order of January 18, 1978, in which plaintiff was found to be entitled to partial summary judgment on the issue of liability and defendant's Cross Motion for Summary Judgment was found to be without merit, the following Findings of Fact and Conclusions of Law are hereby entered. Any Finding of Fact which is properly a Conclusion of Law and any Conclusion of Law which is properly a Finding of Fact is to be so considered. The decision of this Court shall not become final for purposes of appeal until the date of entry of a Final Order fixing those damages due to plaintiff as lost wages.

FINDINGS OF FACT

(1) The Court has jurisdiction of this action and of the parties pursuant to Section 2022 of the Veterans' Reemployment Rights Act (38 U.S.C. § 2022).

(2) Plaintiff Daniel L. Jennings was originally employed by defendant Illinois Office of Education on October 16, 1973, as a Duplicating Operator Supervisor, which position was other than temporary within the meaning of that phrase under the Act.

(3) Plaintiff remained employed in that position until June 1974, when he informed his supervisor of his intent to enlist in the Armed Forces of the United States.

(4) This supervisor advised him to sign a resignation, which was prepared by defendant and which plaintiff signed on June 20, 1974.

(5) Plaintiff left his employment with defendant on June 20, 1974, for the purpose of entering onto active duty with the United States Navy.

(6) Plaintiff entered onto active duty with the United States Navy on June 29, 1974, where he served until August 11, 1975, when he was honorably discharged.

(7) Plaintiff arrived back in Springfield, Illinois, on September 6, 1975, and on approximately September 10, 1975, he timely applied for reinstatement with defendant.

(8) Defendant denied plaintiff's application for reinstatement on September 10, 1975, because there was no current position open at that time.

(9) Plaintiff filed a complaint with the United States Department of Labor in October, 1975, requesting assistance in gaining re-employment with defendant.

(10) By letter dated October 14, 1975, the U.S. Department of Labor informed the defendant of plaintiff's right to re-employment under the Act.

(11) By letter dated November 12, 1975, defendant replied to the October 14, 1975, letter, claiming that plaintiff had no right to re-employment because he resigned his employment on June 20, 1974, instead of requesting a leave of absence.

(12) Defendant has presented a letter dated December 30, 1975, addressed to the United States Department of Labor, requesting that plantiff's military separation papers be supplied to defendant for review. The letter was not sent by registered or certified mail, but rather through the ordinary mails. The Department of Labor, through an appropriate representative, has indicated by affidavit, unrebutted by defendant, that no letter was received from defendant after receipt of defendant's November 12, 1975, letter and before receipt of defendant's February 4, 1976 letter. The Court finds that the nonconflicting evidence shows that while the defendant may have mailed the December 30, 1975 letter it was not received by the U.S. Department of Labor.

(13) Defendant then wrote to the U.S. Department of Labor on February 4, 1976, again requesting a copy of plaintiff's military separation papers.

(14) By letter dated February 20, 1976, the plaintiff's separation papers were forwarded to the defendant, which received the papers on February 26, 1976.

(15) After reviewing the separation papers, defendant wrote to the U.S. Department of Labor on March 9, 1976, requesting that plaintiff report to defendant at his convenience for the purpose of re-employment. This letter was received by the U.S. Department of Labor on March 12, 1976.

(16) In the meantime, plaintiff had secured employment with the Illinois Division of Vocational Rehabilitation on February 2, 1976, and he declined defendant's offer of re-employment.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction of this matter and of the parties pursuant to Section 2022 of the Veteran's Re-employment Rights Act (38 U.S.C. § 2022).

(2) The Act "is to be liberally construed for the benefit of those who left private life to serve their country." (*Alabama Power Co.* v. *Davis,* 431 U.S. 581, 584 (1977)); *Hanna* v. *American Motors Corp.,* 557 F. 2d 118, 120 (7th Cir. 1977).

(3) The Act "clearly manifests a purpose and desire on the part of Congress to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country." *Accardi* v. *Pennsylvania R.R. Co.,* 383 U.S. 225, 228 (1966).

(4) The Court holds that the December 3, 1974, amendment to the Act, which extended federal protection for re-employment rights to returning veterans who were employees of State or local governments, was meant to apply to all veterans who were released from military service on or after December 3, 1974, regardless of the date they entered the military service. As Senator Hartke, Chairman of the Senate Veterans' Affairs Committee stated in reference to the amendment:

> "This coverage for State and local employees is meant to operate prospectively and applies only to veterans who are released from military service on or after the effective date of the enactment of this legislation [December 3, 1974]." (120 *Cong. Rec.* pt. 15, pp. 20051, June 19, 1974).

(5) Plaintiff's employment with defendant prior to his entering military service was other than temporary within the meaning of that phrase under the Act.

(6) Plaintiff left his position with defendant on June 20, 1974, for the purpose of entering onto active duty with the United States Navy, and the fact that he resigned to do so is of no consequence. See *Rudisill* v. *Chesapeake & O. Ry. Co.,* 167 F. 2d 175, 178-179 (4th Cir. 1948); *Congregation of Bros.* v. *Grone,* 164 F. 2d 789, 792 (6th Cir. 1947); *Sipes* v. *City of Trenton,* 79 CCH Labor Cases ¶ 11,520 (D.N.J. 1976); *Borseth* v. *City of Lansing,* 61 N.W. 2d 132, 135-136 (Mich. S. Ct., 1953).

(7) A returning veteran is not required to present his military discharge papers to his employer as a condition precedent to obtaining re-employment rights. *Cf. Travis* v. *Schwartz Mfg. Co.,* 216 F. 2d 448, 454-455 (7th Cir. 1954); *Thompson* v. *Shutterbug Ed's of Caldwell, Inc.,* 81 CCH Labor Cases ¶ 13,260 at p. 24,947 n. 1 (D.N.J. 1977).

(8) An employer may require that a returning veteran produce his military discharge papers if there is a good faith doubt as to the character of the veteran's discharge (i.e., honorable, dishonorable, bad conduct, etc.), as to the actual length of his service or as to his actual date of discharge. See *Hastings* v. *Caterpillar Tractor Co.,* 72 CCH Labor Cases ¶ 14,202 (S.D. Ill. 1973).

(9) An employer may not go behind the discharge to challenge the veteran's rights to reinstatement. See *Hall* v. *Chicago & Eastern Illinois R.R. Co.,* 240 F. Supp. 797, 800 (N.D. Ill. 1964).

(10) The Court concludes that the defendant did not deny re-employment to the plaintiff on September 10, 1975, because of his failure to produce his military separation papers, but rather because defendant had no current open-

ing for plaintiff. The Court further finds that defendant's request for a copy of plaintiff's military separation papers was not conveyed to plaintiff or to the U.S. Department of Labor until February 1976 and that plaintiff acted within a reasonable time in providing defendant with the papers.

(11) An employer cannot refuse to reinstate a returning veteran on the ground that no current opening exists except under the most limited circumstances such as abolition of the veteran's job with no right to transfer (compare *Teamsters Local U. 612* v. *Helton,* 413 F. 2d 1380 (5th Cir. 1969)), or a reduction in force that would have clearly included the veteran (see *Kay* v. *General Cable Co.,* 144 F. 2d 653 (3rd Cir. 1944)).

(12) The fact that another employee may be bumped or displaced does not justify the refusal to reinstate a returning veteran. See *O'Mara* v. *Petersen Sand & Gravel Co., Inc.,* 498 F. 2d 896 (7th Cir. 1974); *Muscianese* v. *United States Steel Corp.,* 354 F. 2d 1394, 1402 (E.D. Pa. 1973); *Armstrong* v. *Cleaner Services, Inc.,* 67 CCH Labor Cases ¶ 12,533 (M.D. Tenn. 1972); *Whitmore* v. *Norfolk & Western R.R. Co.,* 61 CCH Labor Cases ¶ 10,573 (N.D. Ohio 1969); *Stanley* v. *Wimbish,* 154 F. 2d 773, 775 (4th Cir. 1946); *Cf. Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 778 (1976).

(13) The Court reaffirms its prior ruling that plaintiff's claim is not barred by the Eleventh Amendment of the Constitution of the United States. See *Peel* v. *Florida Department of Transportation,* — F. Supp. ——, 81 CCH Labor Cases ¶ 13,159 (N.D. Fla. 1977); appeal pending 5th Cir., No. 77-1846); *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976); *Lichter* v. *United States,* 334 U.S. 742, 781 (1948).

(14) Plaintiff is entitled to lost wages from the date defendant refused to reinstate him (September 10, 1975) to the date he refused a bona fide offer of proper reinstatement, which plaintiff has adopted as March 9, 1976. See *Delaney* v. *Special Service Co.,* 172 F. 2d 16, 20 (5th Cir. 1946); *Dame* v. *C. A. Boston Co.,* 157 F. Supp. 862 (D. Mass. 1958); *O'Mara* v. *Petersen Sand & Gravel Co., Inc.,* 77 CCH Labor Cases ¶ 11,152 (N.D. Ill. 1975) on remand from 498 F. 2d 896 (7th Cir. 1974).

(15) Plaintiff is therefore entitled to back wages for the period of six months less any earnings he had at other employment during that period. See *McCoy* v. *Olin Mathieson Chemical Corp.,* 360 F. Supp. 1336, 1339 (S.D. Ill. 1973); *O'Mara* v. *Petersen Sand & Gravel Co., Inc., supra.*

The parties are ordered to attempt to determine the amount of back wages due to plaintiff in accordance with the foregoing.

Enter this 16th day of February, 1978.

J. WALDO ACKERMAN,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

DANIEL L. JENNINGS,
Plaintiff,
v.
ILLINOIS OFFICE OF EDUCATION,
Defendant.

CIVIL NO. 77-3051

FINAL JUDGMENT

This cause having come on for hearing on plaintiff's Motion for Summary Judgment, and the Court having considered arguments and the Motion, affidavit in support thereof, and the response filed by defendant; now, therefore, for good cause shown, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court's Memorandum Order entered January 18, 1978, and the Memorandum Order incorporating Findings of Fact and Conclusions of Law entered February 16, 1978, are hereby incorporated herein.

2. Defendant shall pay to plaintiff, within thirty days of the entry of the judgment, the sum of $3,072.08, plus prejudgment and post-judgment interest computed at the rate of six percent per annum from December 10, 1975, until paid.

Date: May 15, 1978.

J. WALDO ACKERMAN,
United States District Judge.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1801

DANIEL L. JENNINGS,
Plaintiff-Appellee,
v.
ILLINOIS OFFICE OF EDUCATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.
No. 77-3051—J. WALDO ACKERMAN, *Judge.*

ARGUED NOVEMBER 9, 1978—DECIDED JANUARY 4, 1979

Before CUMMINGS, SPRECHER, and WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge. Plaintiff,* an honorably discharged veterans, brought this action against the Illinois Office of Education, his former employer, because of its failure to offer him reemployment under the Veterans' Reemployment Rights Act (38 U.S.C. § 2021 *et seq.*). Plaintiff was a duplicating operator supervisor in defendant's employ from October 16, 1973, until June 20, 1974, when he resigned to perform military service. On June 29, he entered the U.S. Navy and served until August 11, 1975, when he was honorably discharged.

About a month after his discharge from the Navy, plaintiff applied for reinstatement to his former position but was refused reemplyoment by defendant on the ground that no position was open at the time. Through the assistance of the Department of Labor, on March 12, 1976, defendant offered to reinstate plaintiff to his former position. He refused that offer because he had secured a position with the Illinois Division of Vocational Rehabilitation in February 1976.

In March 1977, plaintiff brought this suit to recover wages lost as a result of defendant's refusal to hire him pursuant to the provisions of the Veterans' Reemployment Rights Act (the Act).[1] The following month the defendant filed a

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1. The relevant portions of the Act appear in 38 U.S.C. as follows:

"§ 2021. *Right to reemployment of inducted persons; benefits protected*

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * *

"(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(Footnote continued on next page)

motion to dismiss on the ground that the Act was unconstitutional under the Eleventh Amendment. After considering memoranda of counsel, Judge Ackerman denied the motion to dismiss, relying on *Peel* v. *Florida Department of Transportation,* 443 F. Supp. 451 (N.D. Fla. 1977).[2] A few months thereafter, the district court granted partial summary judgment to plaintiff on the issue of liability. Simultaneously, the court filed a memorandum order incorporating findings of fact and conclusions of law. In the conclusions of law, the court stated that under the Act an employer cannot ordinarily refuse to reinstate a returning veteran on the ground that no current opening exists or that another employee might be bumped or displaced. Relying again on

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(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; * * *.

"§ 2022. *Enforcement procedures*

"If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *."

2. The *Peel* case is pending on appeal to the Fifth Circuit where it was argued on June 20, 1978.

Peel, supra, and also on *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, and *Lichter* v. *United States,* 334 U.S. 742, 781, the court held the Eleventh Amendment was no bar to recovery and that plaintiff was entitled to back wages for the six months during which defendant refused to reinstate him, until he refused its eventual offer of proper reinstatement. Plaintiff's actual earnings during that six-motnh period were to be deducted from his back wages due under the Act.

Two months thereafter, plaintiff filed a motion for summary judgment ordering defendant to pay him $3,072.08 plus interests and costs.[3] On May 15, 1978, final judgment was rendered for plaintiff in the sum of $3,072.08 plus interest. This appeal followed. We affirm.

Defendant's chief argument is that the Eleventh Amendment renders the Act unconstitutional insofar as it empowers federal courts to award money damages against state departments. For this proposition, defendant relies mainly upon *Edelman* v. *Jordan,* 415 U.S. 651, and *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, but we conclude that they are inapplicable.

In 1974, Congress amended the Act to make reemployment rights mandatory for employees of state and local governments where, as here, a veteran leaves the military service after December 3, 1974. 38 U.S.C. § 2022 specifically authorizes the district courts to require an eligible veteran's employer to reinstate him and to compensate him "for any loss of wages or benefits suffered by reason of such employer's unlawful action" (note 1 *supra*). Since the same

3. In its response to plaintiff's motion for summary judgment on the issue of damages, defendant conceded that if it were liable, plaintiff's back wages and benefits less mitigation would amount to $3,072.08, the exact sum claimed in plaintiff's motion for summary judgment.

provision includes a "State or political subdivision thereof" as an employer, it is clear that Congress has authorized returning veterans to sue this kind of defendant for lost wages. Therefore, the judgment below was proper unless the statute is unconstitutional under the Eleventh Amendment.

The War Powers Clauses

As seen, 38 U.S.C. § 2022 shows that Congress did intend to subject this kind of defendant to suit, and we hold that it had the power to do so under the war powers contained in Article I, Section 8, Clauses 11-13 of the Constitution. In *Case* v. *Bowles,* 327 U.S. 92, the Supreme Court held that the constitutional grant of war powers is sufficient to sustain a statute that might otherwise violate the Tenth Amendment which reserves the states powers not delegated to the United States by the Constitution.[4] The authority of *Case* was not affected by *National League of Cities* v. *Usery,* 426 U.S. 833, on which defendant relies. In *National League of Cities,* Justice Rehnquist took pains to note that *Case* was not being overruled and that the scope of Congress' authority under its war powers was not even being addressed. 426 U.S. at 854-855 n. 18. If the war powers prevail over a state's Tenth Amendment defense, they must equally prevail over a state's Eleventh Amendment defense,[5] and the

4. To like effect, see *United States* v. *Oregon,* 366 U.S. 643, 648-649; *United States Postal Service* v. *Brennan,* 574 F. 2d 712, 716 (2d Cir. 1978).

5. Although the peculiar nature of the Tenth Amendment does not make this conclusion automatic, it follows from the fact that both the Tenth and Eleventh Amendments are expressions of the doctrine of federalism and from the crucial role of the federal war powers.

courts that have considered the matter have so held. *Peel* v. *Florida Department of Transportation, supra; Camacho* v. *Public Service Commission,* 450 F. Supp. 231 (D.P.R. 1978); *Sheely* v. *Idaho Falls School District No. 91,* Civil No. 78-4012 (D. Idaho, decided Nov. 8, 1978); see also *Confederated Tribes of Colville* v. *State of Washington,* 446 F. Supp. 1339, 1350 (E.D. Wash. 1978; statutory three-judge court); *Schaller* v. *Board of Education,* 449 F. Supp. 30, 32-33 (N.D. Ohio 1978).

The reasoning of the *Peel, Camacho* and *Sheely* courts is entirely consistent, as discussed in detail below, with other Eleventh Amendment cases (including *Edelman* v. *Jordan,* 415 U.S. 651, and *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, on which the defendant relies) where private actions against states were held barred because there was no legislative history or statutory language showing that Congress intended to make it possible for a private citizen to sue a state in the federal courts. Here the statute itself does show that Congress intended to permit a veteran to recover lost wages from an employing state agency. Illinois has not shown that this result would unduly burden its treasury. Moreover, the Senate Report accompanying the 1974 amendment to the statute shows that Congress wanted veterans who had been employed by state governments to have their legal rights litigated in the federal courts, so that their reemployment rights might be determined in such a forum. S.Rep. No. 93-907, 93d Cong., 2d Sess., p. 111.

Here Congress was "exercising legislative authority that is plenary within the terms of the Constitutional [war powers] grant." Therefore, in this case the war powers serve as the vehicle for overriding the bar of the Eleventh Amendment. See *Fitzpatrick* v. *Bitzer, supra* at 456.

If the defendant's claim of sovereign immunity were to be honored as to this statute, a State would be impairing part of "the mechanism for manning the Armed Forces of the United States." *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 583. To accept defendant's position would render the Constitution self-destructive. Yet, as stated in *Lichter* v. *United States,* 334 U.S. 742, 781, involving the war contracts Renegotiation Act, the power given to Congress to prosecute war "is not destroyed or impaired by any provision of the Constitution or by any one of the amendments" (quoting with approval from an address by Chief Justice Hughes).

The Eleventh Amendment and Sovereign Immunity

Our conclusion that this suit may be maintained is not inconsistent with other cases considering a state's immunity to suit. The proper interpretation of the Eleventh Amendment[6] and the common law doctrine of sovereign immunity has been a fertile source of controversy for both courts and commentators.[7] The resulting decisions and

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6. The Eleventh Amendment of the Constitution provides:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

7. The major cases and leading law review articles will be discussed in the course of this opinion. For a recent and comprehensive list of the voluminous writing on this subject, see Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I,* 126 U. Pa. L. Rev. 515 (1978) and Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits upon the States,* 126 U. Pa. L Rev. 1203 (1978) (hereinafter Field I and Field II).

articles have established the now universally accepted view that the Amendment was adopted to "repeal" the 1793 decision of the Supreme Court in *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419. It is much less clear what the full effect of the Amendment is, beyond the historically obvious one of barring federal contract actions by out-of-state citizens against non-consenting states. It is well established that federal suits against unconsenting states by their own citizens are also barred, at least where such suits have not been authorized by Congress. *Hans* v. *Louisiana,* 134 U.S. 1. Whether this result is required by the Eleventh Amendment despite the fact that its language is directed only at out-of-state citizens, or whether a state's nonamenability to suits by its own citizens is merely an expression of common law sovereign immunity, is less clear.[8] We need not

8. Justice Brennan believes that *Hans* v. *Louisiana,* 134 U.S. 1, held that sovereign immunity, rather than the Eleventh Amendment, bars citizen suits. *Edelman* v. *Jordan,* 415 US 651, 687 (Brennan, J., dissenting). Justice Rehnquist, on the other hand, appears to think that the Eleventh Amendment embodies the doctrine of sovereign immunity with respect to suits by citizens against their own states. *Edelman, supra* at 663; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 450. Commentators have argued that the Eleventh Amendment merely reenacted the common law doctrine of sovereign immunity even with regard to suits by non-citizens. Field I, *supra n.* 7, at 544-545; Nowack, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 Colum. L. Rev. 1413 (1975) (hereinafter Nowack); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 Harv. L. Rev. 682 (1976 (hereinafter Tribe).

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resolve that debate here since the prevailing interpretation is that the potential bar to citizen suits is the doctrine of sovereign immunity. Whether that doctrine has been constitutionalized or not, the outcome of this case must turn on whether the doctrine of sovereign immunity, in the context of our federated states, is interpreted to authorize congressional abrogation of state's immunity to suits.[9] The present case presents the question of the power of Congress to authorize damage actions against states in a new guise, since here Congress acting under the war powers clauses[10] has explicitly authorized such suits. In these circumstances, the congressional authorization is proper and enforceable.

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These commentators conclude that the proper interpretation of the Eleventh Amendment and Article III is that the state's immunity is not automatically abrogated, but that Congress has the authority to abrogate it, even as to suits by non-citizens. See also Nagata, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State,* 63 Calif. L. Rev. 1167 (1975).

9. Justice Marshall's view of the Eleventh Amendment is that it does not bar congressional abrogation of states' immunity to suit, but that it does prevent federal courts from taking jurisdiction, even when authorized by Congress. 411 U.S. at 287-298 (Marshall, J., concurring). Apparently this interpretation would bar the present suit, but since it seems to be unique to Justice Marshall, we are not bound by it. Moreover, in the present case, Congress did not purport to authorize suits in state courts, so that if Justice Marshall's approach were strictly applied, Congress would have created a right without a remedy.

10. See previous discussion of the crucial role of the war powers clauses in the federal scheme.

A brief review of the recent Supreme Court cases will illumine our reasons for so holding. In *Parden* v. *Terminal Railway Co.*, 377 U.S. 184, 187, Justice Brennan observed that the Eleventh Amendment was directed at federal suits on state debt obligations without the states' consent. See also *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264, 406. The *Parden* Court held that congressioanl authorization of suits against employers under the Federal Employers' Lability Act (FELA) included damage actions against the State of Alabama, which was operating an interstate railroad in its propietary capacity. The Court adopted a bifurcated approach, asking first whether Congress had intended to authorize such suits, and second whether it had the power to do so. Although the FELA did not authorize such suits *in haec verba,* the Court concluded after a review of the statute and its history that such suits had not been intended. Turning to the question of congressional power, the Court said:

> "Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce. While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty', the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.
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> * * *
>
> "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portoin of their sovereignty that would stand in the way of such regulation." *Id.* at 192 (citations omitted).

This seemingly unequivocal language was promptly modified, however, by the Court's assertion that notwithstanding the fact that Congress was acting under the commerce power, a state still must waive its immunity to be amenable

to suit. [11] The Court found such a waiver in the fact that Alabama voluntarily continued to operate the railroad after the FELA had been enacted. Justice White, writing for four dissenters, objected on the ground that the congressional intention to subject states to such suits should be clearly expressed, but strongly implied that Congress would have the power to authorize such suits. *Id.* at 198-199.

In *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, the next case raising the Eleventh Amendment issue, the Court held that Congress had not authorized suits by state employees under the Fair Labor Standards Act (FLSA). It interpreted *Parden, supra,* as depending on a waiver of immunity by the state, and concluded:

> "The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court.
>
> * * *
>
> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." *Id.* at 283-284.

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11. This has caused some confusion as to whether a state must waive its immunity by consenting to suit even when the congressional authorization for such suits is clear. Mr. Justice Brennan has interpreted his majority opinion in *Parden* as requiring the state to consent to suit only when the congressional intention to enact substantive regulation, but not the intention to subject the states to federal court suits, is clearly expressed. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 299-301 (Brennan, J., dissenting).

Mr. Justice Douglas, writing for the majority, thus strongly implied that Congress acting under its Article I powers could condition the operations of the state on the forfeiture of immunity from suit in federal courts, resulting in what has been labeled a "forced waiver" of immunity. However, he concluded that Congress had not exercised such power in the FLSA.

The following Term, the Court held that a suit against a state official which would result in retroactive monetary relief paid from the state treasury was barred by the Eleventh Amendment. *Edelman* v. *Jordan,* 415 U.S. 651. The suit was brought to enforce certain provisions of the Social Security Act and regulations pursuant to it which implemented the Aid to the Aged, Blind and Disabled program. Neither the stature nor the regulations expressly authorized suits against states. The Supreme Court concluded that such suits were not authoried by *Ex Parte Young,* 209 U.S. 123, distinguishing between prospective injunctive relief (authorized in *Young*) and retrospective monetary relief. Mr. Justice Rehnquist, writing for the majority, also held that Illinois had not waived its immunity from suit by participating in the federally funded program. The Court first noted that "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." *Id.* at 672. It then concluded that a waiver of state immunity should be found "only where stated by the most express language or by * * * overwhelming applications from the text * * *." *Id.* at 673. The Court, noting that the only sanction in the Social Security Act was a provision for withholding federal funds from noncomplying states, concluded that:

> "[t]his provision by its terms did not authorize suit against anyone, and * * * fell far short of a waiver by a participating State of its Eleventh Amendment immunity." *Id.* at 674.

The clear implication of this language is that a more express congressional authorization to sue a state in federal court would constitute such a waiver.

When the Court was presented with just such an express authorization in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, it unequivocally held that such suits were not barred by the Eleventh Amendment or sovereign immunity. Since the statute in *Fitzpatrick* was enacted pursuant to Congress' enforcement powers under Section 5 of the Fourteenth Amendment, it does not directly control a case such as the present one where Congress was acting pursuant to an Article I power. However, the mode of analysis of the *Fitzpatrick* decision is instructive.

The Supreme Court focused on the grant of power from the states to the federal government under the Fourteenth Amendment, asking whether that grant included the power to abrogate the states' immunity to suit. In undertaking a similar analysis with respect to the powers delegated in Article I, and in particular the war powers, we are aided by three recent law review articles, all of which have argued convincingly that nothing in the language, history or policy of the Eleventh Amendment or the doctrine of sovereign immunity forecloses Congress, acting under a delegated power, from making a state amenable to suit in the federal courts.[12] These and other commentators have concluded that to the extent Congress acts under the sovereign powers delegated to it by the states "in the plan of the conven-

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12. Professor Nowack (Nowack, *supra* n. 8) presents a detailed historical interpretation of the extents to which the doctrine of sovereign immunity was modified in Article III. After analyzing *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, and the history of the Eleventh Amendment, he concludes

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tion,'"[13] It has the power to abrogate the states' immunity. This approach is especially convincing where as here, the

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that both Article III and the Eleventh Amendment prohibit judicial, but not congressional, abrogation of a state's immunity.

Professors Tribe and Field, after independent analyses, concur in this interpretation (Tribe, *supra* n. 8; Field I, *supra* n. 7). All three articles stress that allowing Congress to abrogate states' immunity to federal suits is faithful to the policies of federalism which permeate the Eleventh Amendment. As Professor Nowack puts it:

> "A Congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent and that the hardship on the state is not severe. The states may adjust to the congressional enactment or, if the regulation proves onerous, they may exert their influence on Congress to have it changed. * * * [I]t is Congress that is responsive to the influence of the states. * * * The clear implication in the eleventh amendment context is that Congress did, in fact, determine that the federal policy should be preeminent and that the hardship on the state would not be severe." (Footnote omitted.) Nowack, *supra,* n. 7, at 1442.

13. Hamilton's interpretation of the doctrine of sovereign immunity as applied to the states, quoted at length in *Monaco* v. *Mississippi,* 292 U.S. 313, 324, is als follows:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. *Unless, therefore there is a surrender of this immunity in the plan of the convention,* it will remain with the states * * *." (Second emphasis supplied.)

suit is by a citizen against his own state[14] and Congress has clearly authorized it pursuant to its war powers.

Our holding today was foreshadowed by *Employees, supra, Edelman, supra,* and *Fitzpatrick, supra.* The express congressional authorization of damage suits against states in the Act involved here constitutes the "forced waiver" or exercise of delegated power to "bring the states to heel" that the Supreme Court searched for but failed to find in *Employees* and *Edelman.* We read those cases, together with *Parden,* as establishing that to make states amenable to federal damage actions there must be congressional action under a delegated power and either consent to suit by a state (express or implied) or a clearly expressed congressional intention to abrogate the states' immunity. Since in this case we have the latter condition, we need not search for consent to suit by the State of Illinois. Although this result may be reached through the doctrine of "forced waiver," to the extent that phrase fails to distinguish between the original waiver (the delegation of powers in the Constitution) and a present waiver by a state through its consent to be sued, it seems needlessly confusing. It would seem preferable to describe the congressional action here as an exercise of power delegated to it "in the plan of the convention," which includes the power to make the states amenable to damage actions in the federal courts.

There is support for this approach in *Fitzpatrick* v. *Bitzer, supra.* The powers delegated under the Fourteenth Amendment clearly are not co-extensive with those delegated under Article I, so that, as previously noted, *Fitzpatrick* does not control this case. However, just as Justice Rehnquist analyzed the delegation of powers to Congress

14. See discussion accompanying note 8, *supra.*

under the Fourteenth Amendment to determine whether the states had relinquished their sovereignty to the extent of delegating to Congress the power to abrogate their immunity, our task is to determine the same question under the delegation of powers in Article I. To the extent *Fitgpatrick* turns on an interpretation of Section 5 of the Fourteenth Amendment as a *pro tanto* repeal of the Eleventh Amendment and the incorporated doctrine of sovereign immunity. *Fitzpatrick* would of course not be precedent for the approach we take today. Even if that is what *Fitzpatrick* stands for, however, it does not undercut our analysis, since the Court in *Fitzpatrick* surely wanted to make its constitutional holding as narrow as possible.[15] However, as indicated, we think that the proper reading of *Fitzpatrick* reveals that it turns on delegation of powers, rather than repeal.[16]

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15. Because the law in *Fitzpatrick* would, under this reading, be constitutional because of the repeal theory, there would have been no necessity to reach the delegation of powers issue.

16. Some of the Court's language could be interpreted to suggest that Congress can exercise power to authorize federal damage actions against states under the Fourteenth Amendment when it could not do so under Article I. That is one interpretation of the following passage:

> "We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman* v. *Jordan,* 415 U.S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459 (1945)." (Footnote omitted.) 427 U.S. at 456.

However, since the cases cited are ones in which there was no congressional authorization, the preferable interpreta-

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Under our reading of *Fitzpatrick,* only if the Eleventh Amendment is interpreted both to constitutionalize the doctrine of sovereign immunity and to alter what historians and the Supreme Court have accepted as the original conception of the framers (see notes 12 and 13, *supra*), would it matter that the authorization to sue was enacted under the Fourteenth Amendment rather than Article I.[17] Nothing in *Fitzpatrick* suggests that the Court believes that the Eleventh Amendment so altered the federal scheme, and such an interpretation would not be in accord with the conclusions of the scholars who have studied the history of the Eleventh Amendment (see note 12, *supra*).

Applying the delegation of powers analysis to the present case, we are, as previously indicated, convinced by the analyses of scholars who have thoroughly researched the question and concluded that such power was delegated.[18] Moreover, the previously discussed decisions of the Supreme Court in *Parden, Employees,* and *Edelman* establish that such an exercise of power by Congress is constitutional.

Our holding does not conflict with considerations of federalism. The statute here involved could be construed as authorizing "retrospective" damage actions against states,

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tion of this passage appears to be that Congress can authorize suits under the Fourteenth Amendment (and, we would now add, under Article I) that would have been unconstitutional if not authorized by Congress.

17. If the Eleventh Amendment were so interpreted, it could be argued that the Eleventh Amendment altered the delegation of powers in Article I, but had no effect on the delegation in the Fourteenth Amendment.

18. Nowack, *supra* n. 8, and authorities cited therein; Field I, *supra* n. 7.

which were historically the type of actions at which the Eleventh Amendment was directed, but nothing in the prior cases or policy considerations compels that its enforcement be denied. First, the damages authorized here are not "retroactive" in the sense that they create new liabilities for behavior that had not previously clearly been determined to be illegal.[19] Moreover, in *Edelman,* where the Supreme Court stressed its reluctance to hold states amenable to such suits, it was being asked to expand judicially created exceptions to the doctrine of state immunity rather than, as here, to enforce a clearly articulated congressional policy.

Neither of the reasons commonly advanced for the reluctance to hold states liable for damages—the burden on their treasuries and the intrusion into their processes—applies here. The fiscal burden resulting from purely prospective relief can be at least as great as that caused by damage actions. The Supreme Court has acknowledged this,[20] and has held that even an enoromus fiscal burden imposed by congrressional action abrogating a state's immunity would be constitutional.[21] Moreover, any intrusion into the state's internal processes here is the work of Congress. Where the requirements of federal law have been clearly articulated by Congress acting under a delegated power and in a manner that does not contravene the Tenth

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19. Nowack, *supra* n. 8, suggests that only an attempt by Congress to create "a cause of action making states liable for actions taken prior to the effective date of the legislation" would be unconstitutional because of the Eleventh Amendment. 75 Column. L. Rev. at 1444.

20. 415 U.S. at 667

21. 411 U.S. at 284.

Amendment,[22] the states have no choice as to how to order their affairs to comply with the dictates of federal law. The only question then confronting the federal courts is whether they have the power to enforce the congressional mandate. *Fitzpatrick* v. *Bitzer, supra,* and the Supreme Court's most recent decision in this area, *Hutto* v. *Finney,* — U.S. —, 46 LW 4817, answer this question in the affirmative.

In *Hutto,* the plaintiff was awarded counsel fees, to be paid from state funds, on the ground that this was necessary to the enforcement of prospective relief. The Supreme Court held that once a federal injunction issued, it could be enforced by the assessment of a monetary award against the state. Applying *Hutto* to the facts in our case, it seems clear that if the plaintiff had continued to seek reinstatement, he would be entitled to a federal court injunction ordering it and that if the state refused to comply, he would be entitled to his wrongfully withheld wages as the means of enforcing the prospective relief. Yet where the federally imposed obligations have been clearly articulated by Congress, it would seem anomalous indeed to require a federal court injunction ordering a state to comply with the congressional mandate before it could be effectively enforced.

Justice Stevens, writing for the Court in *Hutto,* pointed out that Congress had the power to pass legislation abrogating the states' immunity by imposing taxable costs on the states even "without expressly stating that it intends to abrogate the State's Eleventh Amendment immunity." *Id.* at —, 46 LW at 4822. By the same token when Congress,

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22. While the Tenth Amendment might in some instances present a bar to the accomplishment of congressional policy and *ipso facto* to private suits enforcing that policy, the State of Illinois has specifically disclaimed reliance on the Tenth Amendment. Reply br at 20, n 5.

acting under its war powers, expressly abrogates that immunity, it has the authority to do so.

Insufficiency of State Remedy

Finally, defendant argues that the district court should not have assumed jurisdiction because the Illinois Service Men's Employment Tenure Act (Ill. Rev. Stat., ch. 126½, § 29 et seq 1977) provided a remedy. We cannot accept this argument because the Veterans' Reemployment Rights Act preempts state law in view of "Congress' explicit design for uniform enforcement among the States * * *." *Peel* v. *Florida Department of Transportation, supra,* 443 F. Supp. at 460.

Judgment affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
MAY 3 1979
MICHAEL RODAK, JR., CLERK

No. 78-1438

In the Supreme Court of the United States

OCTOBER TERM, 1978

ILLINOIS OFFICE OF EDUCATION, PETITIONER

v.

DANIEL L. JENNINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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ILLINOIS OFFICE OF EDUCATION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the district court's award of back pay to respondent under the Veterans' Reemployment Rights Act violated the Eleventh Amendment.

Petitioner employed respondent from October 1973 to June 1974, when respondent joined the Navy. He served on active duty until August 1975, when he was honorably discharged. He made a timely application to return to his former job with petitioner, but petitioner refused to rehire him. Respondent then sought assistance from the Department of Labor, which informed petitioner that respondent was entitled to be reinstated to his former position under the Veterans' Reemployment Rights Act, 38 U.S.C. 2021 *et seq.* On March 12, 1976, petitioner agreed to rehire respondent. Respondent refused the offer because he had taken a job with the Illinois Division of Vocational Rehabilita-

tion a month earlier. He then brought this suit, seeking back pay for the period that petitioner had refused to rehire him[1] (Pet. App. B1-B2).

The United States District Court for the Southern District of Illinois entered summary judgment for respondent, holding that he is entitled to back pay (less any earnings he received from other sources during that period), and that his claim is not barred by the Eleventh Amendment (Pet. App. A1-A10).

The court of appeals, in a thorough opinion on which we rely, affirmed (589 F. 2d 935; Pet. App. B1-B20). It held that the Veterans' Reemployment Rights Act (the Act) is an exercise of congressional power under the War Powers Clauses[2] (Pet. App. B5-B7) and that, under the analysis of *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Eleventh Amendment does not bar recovery against a state. The court of appeals acknowledged that the statute allowing recovery against a state for employment discrimination in *Fitzpatrick* was enacted under the authority of Section 5 of the Fourteenth Amendment, while the Act at issue here was based on the War Powers Clauses (Pet. App. B13-B17), but it held that "[n]othing in *Fitzpatrick* suggests" that the result there would have been any different if "the authorization to sue was enacted under" Article I rather than the Fourteenth Amendment (Pet. App. B17).

Petitioner does not dispute that Congress has expressly authorized respondent to sue it under the

[1]The Department of Justice represents respondent pursuant to 38 U.S.C. 2022.

[2]"The Congress shall have Power * * * [t]o raise and support Armies * * * [and] [t]o provide and maintain a Navy * * *." Art. I, Sec. 8, cl. 12, 13.

Act,[3] nor does it contest either its liability under the Act or the amount of back pay awarded. It does not contend that the substantive provisions of the Act exceed Congress' power. Its sole contention is that, as applied to a state, the Act violates the Eleventh Amendment (Pet. 4-14). The argument, in other words, is that this suit should have been brought in state court rather than federal court.

The decision of the court of appeals is the first appellate opinion that has addressed the question presented here. There is thus no conflict among the circuits. Every district court that has considered the question has agreed with the disposition reached here.[4] In the absence of a conflict among the circuits, there is no reason for review by this Court.

The court of appeals' decision, moreover, is correct. A line of cases has established that Congress, in the exercise of powers granted by the Constitution, can require states to defend suits in federal courts. Congress need only exercise its power clearly. See *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Fitzpatrick* v. *Bitzer*, *supra*; *Employees* v. *Missouri Public Health Department*, 411 U.S. 279 (1973). "Congress has plenary power to set aside the States' immunity from

[3]In 1974 Congress amended the Act to apply to states and political subdivisions acting as employers. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, Section 2021(a)(B), 88 Stat. 1594. See Pet. App. B4.

[4]See *Witter* v. *Pennsylvania National Guard*, 462 F. Supp. 299 (E.D. Pa. 1978); *Camacho* v. *Public Service Commission*, 450 F. Supp. 231 (D.P.R. 1978); *Schaller* v. *Board of Education*, 449 F. Supp. 30 (N.D. Ohio 1978); *Peel* v. *Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), appeal argued, No. 77-1846 (5th Cir. June 20, 1978); *Sheely* v. *Idaho Falls School District*, 84 Lab. Cas. para. 10,911 (D. Idaho 1978).

retroactive relief in order to enforce the Fourteenth Amendment." *Hutto* v. *Finney, supra*, 437 U.S. at 693. That much is unquestioned. It is also unquestioned that Congress has explicitly set aside the states' immunity and subjected them to suit in federal courts in veterans' reemployment cases. See note 3, *supra*. The only question presented here, therefore, is whether Congress' power to subject states to suit in federal courts must rest on authority derived from the Fourteenth Amendment or, instead, may rest on authority conferred by other provisions of the Constitution.

There is no reason why such a distinction should be made, and the premise of this Court's decision in *Missouri Public Health Department* is that such a distinction would not be made. The Veterans' Reemployment Act is supported by Congress' authority to "provide[ ] the mechanism for manning the Armed Forces of the United States." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977). See also *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285 (1946).

> [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive * * *.

Lichter v. *United States*, 334 U.S. 742, 781 (1948), quoting Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 247-248 (1917).

The power to "raise and support Armies" and to "provide and maintain a Navy" was delegated to the national government in the Constitution, and the court of appeals properly concluded (Pet. App. B13-B17) that it is no less plenary than the power to enforce the Fourteenth Amendment. As that court stated: "[N]othing in the language, history or policy of the Eleventh Amendment or the doctrine of sovereign immunity forecloses Congress, acting under a delegated power, from making a state amenable to suit in the federal courts" (*id.* at B13).

Against this analysis, petitioner argues that: "Focusing on federalism leads to the conclusion that the Eleventh Amendment should be viewed as a restriction on both the judicial power to entertain, and the congressional authority to create private damage actions in the federal courts" (Pet. 6). But this vague "[f]ocus[ ] on federalism" ignores the analysis of *Fitzpatrick*, *Hutto*, and the other cases discussed above. Petitioner offers no convincing reason why that analysis must be "carefully limited * * * to suits arising under §5 of the Fourteenth Amendment" (Pet. 10).[5]

In fact, petitioner concedes that "Congress has the unquestioned authority to preempt this field" and argues that, since it did not, "there are no factors militating strongly in favor of exclusive federal jurisdiction in veterans' reemployment cases" (Pet. 12). But this approach fails for two reasons. First, if Congress can preempt the field without violating the

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[5]This Court has, moreover, explicitly held that Acts of Congress that are necessary and proper to the exercise of the war powers may properly intrude into "area[s] normally left to the States * * *." *United States* v. *Oregon*, 366 U.S. 643, 649 (devolution of property).

Eleventh Amendment, it does not sacrifice that power merely by allowing states to provide their own remedies in cases of veterans' reemployment. Indeed, petitioner's analysis is refuted by *Fitzpatrick* itself, because Congress did not forbid states to provide their own remedies for employment discrimination based on race, sex or other factors. See 42 U.S.C. 2000e-5(c).

Second, the court of appeals did not hold that there was "exclusive federal jurisdiction in veterans' reemployment cases," as petitioner implies (Pet. 12). It merely held that the federal right that Congress provided was within its powers; nothing in the opinion suggests that state statutes providing similar remedies are ousted by the federal Act, or that state courts are to be closed.[6] See 38 U.S.C. 2021(c). Therefore, petitioner's argument that the Act "constitute[s] an unwarranted intrusion into the local affairs of this State" (Pet. 12) is unsupported.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[6]Illinois has provided such remedies. See Pet. 5 n.1.

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